

60158-143

**REMARKS**

Claims 1, 3-14 and 25-26 stand rejected under 35 U.S.C. §103(a) as being obvious over the German Reference DE 39 39 352 in view of the admitted prior art or over the admitted prior art in view of the German Reference. The Examiner admits that the German Reference fails to teach a pair of opposing flanges curved away from a forming channel. The Examiner states that the admitted prior art teaches a forming track having a pair of opposing flanges (20) curved away from a forming channel. The Examiner contends that it would have been obvious to modify the German reference by providing a pair of opposing flanges curved away from the forming channel, or to provide the admitted prior art with a curved cross-section, and therefore the claimed invention is obvious. Applicant respectfully disagrees.

The German Reference is an untranslated, German reference with a very brief English abstract. The English abstract supplied by the Examiner is insufficient to fully understand the teachings and benefits of the German Reference. The Board has held that the Examiner must provide a translation of a foreign reference relied upon for a rejection. (See *Ex parte Gavin*, 62 USPQ2d 1680 (BPAI 2001)). In *Gavin*, the Examiner used an English-language abstract from a Japanese patent to reject the claims of Gavin's application. The Board reversed, saying that the Examiner must provide an English-language translation of the entire patent or remove it as a reference. Obtaining translations is the responsibility of the Examiner. The Board stated an abstract rarely fully describes an invention as claimed, and even if it did, no one could be sure without an examination of the specification. The Examiner cannot argue that claims 1, 3-14 and 25-26 are obvious in view of the German Reference in view of the admitted prior art without knowing what the German Reference teaches. Accordingly, consistent with the Board's holding, the Examiner must provide a translation of the German Reference or withdraw the rejection and allow the pending claims. Applicant requests that the Examiner obtain a translation of the German Reference so that Applicant and the Examiner can more clearly understand the teachings of the German References. Claims 1, 3-14 and 25-16 are not obvious, and Applicant requests that the rejection be withdrawn.

However, the claimed invention is not obvious in view of the German Reference and the admitted prior art. The claims recite a track assembly including a track portion including a channel having a curved-cross section and a securing feature including at least one flange curved

60158-143

away from the channel. In the admitted prior art, reference numeral 20 refers to the machine forming mold 20 as a whole, and does not refer to any flanges. If the Examiner is referring to the portions extending to the left and the right of the machine forming mold 20, these portions are not a securing feature are required by the claims because they do not secure anything in the channel 18. Additionally, these portions also do not **curve away** from the channel 18 of the mold 20 as claimed by Applicant. Therefore, even if the prior art is combined with the German Reference, the combination does not teach, suggest or disclose the claimed invention.

The claimed invention is also not obvious in view of the admitted prior art and the German Reference. There is no motivation to employ a curved channel in the admitted prior art. Because the channel 18 of the admitted prior art is square, fingers 24 are employed to retain a tubing 16 in the channel 18. Because of the presence of the fingers 24, there is no reason, suggestion or motivation to curve the channel 18. Additionally, adding a curved channel to the admitted prior art is clearly a use of hindsight reconstruction. It is impermissible to engage in hindsight reconstruction of the claimed invention, using the appellant's structure as a template and selecting elements from the references to fill the gaps. The references themselves must provide some teaching whereby the appellant's combination would have been obvious. In re Gorman, 933 F.2d 982, 986, 18 USPQ2d 1885, 1888 (Fed. Cir. 1991). There simply is no suggestion in the references, or in the prior art as a whole, that suggests the desirability of making the combination. The claimed invention is not obvious, and Applicant respectfully requests that the rejection be withdrawn.

Thus, claims 1-9 and 11-26 are in condition for allowance. No additional fees are seen to be required. If any additional fees are due, however, the Commissioner is authorized to charge Deposit Account No. 50-1482, in the name of Carlson, Gaskey & Olds, P.C., for any additional fees or credit the account for any overpayment. Therefore, favorable reconsideration and allowance of this application is respectfully requested.

60158-143

Respectfully Submitted,

CARLSON, GASKEY & OLDS, P.C.

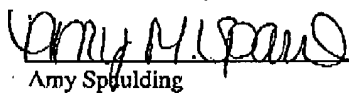


Karin H. Butchko  
Registration No. 45,864  
Attorneys for Applicant  
400 West Maple Road, Suite 350  
Birmingham, Michigan 48009  
(248) 988-8360

Dated: May 25, 2004

**CERTIFICATE OF FACSIMILE**

I hereby certify that this correspondence is being facsimile transmitted to the United States Patent and Trademark Office, (703) 872-9306 on May 25, 2004.

  
Amy Spaulding

N:/clients/formrite/ip00143/pat/143response2.doc